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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NME HOSPITALS, INC.
D/B/A LUTHERAN MEDICAL CENTER, *et al.*,
Petitioners,

v.

MISSOURI DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF MEDICAL SERVICES,
Respondent.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals For the Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to State Regulation 13 C.S.R. 70-15.010(15), Missouri adopted a cap on the per diem payment it would pay Medicaid providers for inpatient psychiatric services ("Pysch Cap") they provided to Medicaid beneficiaries. This regulation was challenged in a separate action and found invalid and void on the basis that it violated federal Medicaid law, specifically the Boren Amendment. 42 U.S.C. § 1396a(13)(A) (repealed 1997). Those hospitals that first challenged the Pysch Cap were awarded the difference between what they were reimbursed with the Pysch Cap and what they should have received without it. These Petitioners subsequently sought, but were denied, this same relief. The questions presented here are:

1. Whether Petitioners are entitled to the difference between what they were reimbursed for psychiatric services under the invalid Psych Cap and what they would have received without the Psych Cap, in light of this Court's ruling in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), which held that where a new rule of law has been applied to the litigants in one case, the rule must be applied with respect to all other similarly situated litigants, and Medicaid appeal cases from other states.

2. Whether a state, by simply withdrawing or repealing a regulation which has been found void because it violates federal Medicaid law, can avoid paying Medicaid providers the difference between what they were paid under the invalid regulation and what they should have been paid.

PARTIES

The following, who appeared as Plaintiffs/Appellants in the court below, are Petitioners in this Court: NME Hospitals, Inc., d/b/a Lutheran Medical Center; Deaconess Health Services, Corp., d/b/a Deaconess Hospital; St. John's Regional Health Center; St. Louis University Hospital, d/b/a St. Louis University Hospital Medical Center; Southeast Missouri Hospital Assoc., d/b/a Southeast Missouri Hospital; Lucy Lee Hospital, Inc.; St. Luke's Northland Hospital Corp.; Deaconess Medical Center – West Campus; Psychiatric Healthcare Corp. of Missouri, n/k/a Paracelsus Healthcare Corporation, d/b/a Lakeland Regional Hospital; St. John's Regional Medical Center; BHCA of Kansas City, Inc., f/k/a Valuemark Behavioral Healthcare of Kansas City, d/b/a North Hills Hospital, n/k/a Hallmark Youthcare – Kansas City, Inc. ("Petitioners" or "Hospitals").

The Missouri Department of Social Services, Division of Medical Services ("DMS" or "State") who appeared as Defendant/Respondent in the court below is named as Respondent in this Court.

Rule 29.6 List

NME Hospitals, Inc., d/b/a Lutheran Medical Center: Parent company – Tenet HealthSystem DI, Inc.

Deaconess Health Services Corp., d/b/a Deaconess Hospital: Member of Deaconess Incarnate Word Health System, which is controlled by The Deaconess Foundation and Incarnate Word Health System

St. John's Regional Health Center: Parent company – St. John's Health System, Inc.

St. Louis University Hospital, d/b/a St. Louis University Hospital Medical Center: There is no parent or publicly held company owning 10% or more of the entity.

Southeast Missouri Hospital Assoc., d/b/a Southeast Missouri Hospital: There is no parent or publicly held company owning 10% or more of the entity.

Lucy Lee Hospital, Inc.: Parent company - Tenet HealthSystem Medical, Inc.

St. Luke's Northland Hospital Corp.: Parent company – Saint Luke's Hospital of Kansas City

Deaconess Medical Center – West Campus: Member of Deaconess Incarnate Word Health System, which is controlled by The Deaconess Foundation and Incarnate Word Health System

Psychiatric Healthcare Corp. of Missouri, n/k/a Paracelsus Healthcare Corporation, d/b/a Lakeland Regional Hospital: Entities owning more than 10% of entity – Park-Hospital GmbH

St. John's Regional Medical Center: Parent company – Catholic Health Initiatives

BHCA of Kansas City, Inc., f/k/a Valuemark Behavioral Healthcare of Kansas City, d/b/a North Hills Hospital, n/k/a Hallmark Youthcare – Kansas City, Inc.: Parent company – Hallmark Systems, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
Procedural Background	4
Decision of the Court of Appeals	7
How the Federal Questions were Presented	7
REASONS FOR GRANTING THE WRIT	9
I. THE MISSOURI COURT OF APPEALS' RULING, WHICH HAS THE EFFECT OF TREATING SIMILARLY SITUATED ENTITIES DIFFERENTLY, IS SO PLAINLY WRONG UNDER THIS COURT'S PRECEDENT AND MEDICAID APPEAL CASES FROM OTHER STATES AS TO WARRANT SUMMARY REVERSAL	11
II. A STATE SHOULD NOT BE PERMITTED TO AVOID LIABILITY AND FEDERAL REMEDY AND RETROACTIVITY PRINCIPLES BY SIMPLY WITHDRAWING A	

REGULATION WHICH HAS ALREADY BEEN DECLARED INVALID AND VOID BECAUSE IT VIOLATES FEDERAL MEDICAID LAW 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES Page

American Trucking Assn's, Inc. v. Sheiner, 483 U.S. 266 (1987) 12

Americare Properties, Inc. v. Whiteman, 891 P.2d 336 (Kan. 1995) 15

Avon Nursing Home v. Axelrod, 639 N.E.2d 1124 (N.Y. 1994) 14, 15

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 11, 12

Dept. of Soc. Servs. v. Alexian Bros. of St. Louis, Inc., 930 S.W.2d 439 (Mo. App. W.D. 1996) 4, 5, 6, 12, 14, 16

Dept. of Soc. Servs. v. Great Plains Hosp., 930 S.W.2d 429 (Mo. App. W.D. 1996) 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 16

Dept. of Soc. Servs. v. Trinity Lutheran Hosp., 930 S.W.2d 426 (Mo. App. W.D. 1996) 4, 5, 6, 12, 14, 16

Desist v. United States, 394 U.S. 244 (1969) 13

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) 14

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 9, 10, 11, 12, 13, 14, 15, 17

New England Mem'l Hosp. v. Rate Setting Comm'n, 475 N.E.2d 740 (Mass. 1985)..... 15

Pinnacle Nursing Home v. Axelrod, 928 F.2d 1306 (2nd Cir. 1991) 14, 15

Psychcare Management v. Dept. of Soc. Servs., 980 S.W.2d 311 (Mo. banc 1998)..... 17

Volk v. Dept. of Human Resources, 799 P.2d 658 (Or. 1990) 15

FEDERAL STATUTES

28 U.S.C. § 1257 1

42 U.S.C. § 1396 et seq. (1992)..... 2

42 U.S.C. § 1396a(13)(A) (repealed 1997)..... 1, 2, 3

42 U.S.C. § 1396a(13)(A) (1997) 3

42 U.S.C. § 1396a(37) (1977) 5

OTHER AUTHORITIES

42 C.F.R. § 447.253(e)..... 5

Mo. Rev. Stat. § 208.156 (1994) 6

Mo. Rev. Stat. § 208.156.4 (1994) .. 6, 7, 8, 10, 11, 16, 17

Mo. Rev. Stat. § 621.055 (1984) 5

13 C.S.R. 70-15.010..... 4

13 C.S.R. 70-15.010(15) 3

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari be issued to review the ruling of the Missouri Court of Appeals for the Western District in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals for the Western District is reported at 11 S.W.3d 776 and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App."), beginning at page A-1. The unpublished order of the Administrative Hearing Commission, which found that Petitioners were entitled to Medicaid reimbursement after the invalidation of the Psych Cap, appears at Pet. App. A-11. The opinion of the Circuit Court of Cole County (Pet. App. *infra*, A-28) is unreported.

JURISDICTIONAL STATEMENT

The Missouri Court of Appeals for the Western District entered its opinion and judgment on December 28, 1999. On February 1, 2000, the Court of Appeals denied the Hospitals' timely Motion for Rehearing and Application for Transfer. On March 21, 2000, the Missouri Supreme Court denied the Application for Transfer filed with that court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

The Boren Amendment, 42 U.S.C. § 1396a(13)(A) (repealed 1997), which was in effect at all times pertinent hereto, required a state Medicaid plan to:

> Provide . . . for payment . . . of the hospital services . . . provided under the plan through the use of rates

> . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and federal laws, regulations, and quality and safety standards . . . .

42 U.S.C. § 1396a(13)(A) (repealed 1997).

STATEMENT OF THE CASE

The Petitioners in this case are Missouri healthcare providers that provided inpatient psychiatric services to Medicaid beneficiaries. They seek to be reimbursed for these services at rates determined to be reasonable and adequate under the last validly promulgated State Medicaid Plan rather than at a fixed rate that was enacted in violation of federal Medicaid law.

The Medicaid Act, 42 U.S.C. § 1396 *et seq.* (1992), authorizes federal grants to help states provide medical assistance to certain low income individuals. Participation in the program is voluntary. If, however, a state chooses to participate in the program, then, in exchange for federal funding, it must comply with certain federal regulations. In order to receive federal Medicaid funds a state is required to submit a state Medicaid assistance plan to the Health Care Financing Administration, which is the agency within the federal Department of Health and Human Services designated by Congress to administer the Medicaid program at the federal level. That plan is to include the methodology the state will use to reimburse healthcare providers for the services they provide Medicaid beneficiaries. Under the 1981 Boren Amendment to the Medicaid Act, the plan had to

include the state's "findings" and "assurances" that its reimbursement rates were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" and that the plan complied with applicable federal laws and regulations. 42 U.S.C. § 1396a(13)(A) (repealed 1997).[1]

Prior to January 1, 1990, Missouri healthcare providers received per diem reimbursement based on their actual cost of care. This per diem rate was part of the State Medicaid Plan for which the necessary "findings" and "assurances" had been made ("Plan Rate"). In 1990, DMS, the state agency that administers the Missouri Medicaid program, enacted 13 C.S.R. 70-15.010(15), which placed a cap on the per diem reimbursement for inpatient psychiatric services. In every case, the Psych Cap was lower than the Plan Rate that the Petitioners were receiving prior to the adoption of the Psych Cap.

In *Dept. of Soc. Services v. Great Plains Hosp.*, the Missouri Court of Appeals determined that the DMS violated federal Medicaid law, more specifically the "findings" requirement of the Boren Amendment, when it enacted the Psych Cap. *Dept. of Soc. Services v. Great Plains Hosp.*, 930 S.W.2d 429, 437 (Mo. App. W.D. 1996). The court found the Psych Cap invalid and void and held that the hospital in *Great Plains* should recover reimbursement lost because of the invalid rule. *Id.* at. 437-38. The court held that the hospital "was entitled to be reimbursed pursuant to the previous

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[1] The Balanced Budget Act of 1997 repealed the Boren Amendment's requirement that a state must "find" and make "assurances" that the rates are "reasonable and adequate." 42 U.S.C. § 1396a(13)(A) (1997). Petitioners' cause of action, however, is for damages suffered prior to the repeal of the Boren Amendment.

unamended plan until such time as that plan [was] changed according to the applicable procedures." This same retroactive relief, i.e. the difference between what a hospital should have received for inpatient psychiatric services without the Psych Cap and what the hospital received with the Psych Cap, was subsequently provided to two other Missouri hospitals that had suffered similar damages as a result of the application of the invalid regulation and had sued to recover their losses. *See Dept. of Soc. Servs. v. Trinity Lutheran Hosp.*, 930 S.W.2d 426, 429 (Mo. App. W.D. 1996); *Dept. of Soc. Servs. v. Alexian Bros. of St. Louis, Inc.*, 930 S.W.2d 439, 441 (Mo. App. W.D. 1996).

After the Psych Cap was declared void in *Great Plains*, and after the decision reached in *Great Plains* was applied to the hospitals in *Trinity Lutheran* and *Alexian Brothers*, the Pysch Cap was temporarily withdrawn by the State through an emergency regulation filed on September 13, 1996. (L.F., Vol. I, pp. 141-42). The emergency amendment, which was adopted without prior public notice, became effective on October 1, 1996 and by its own terms expired on March 29, 1997. *Id.* A rule permanently withdrawing the Psych Cap regulation took effect on April 30, 1997. (13 C.S.R. 70-15.010) (L.F., Vol. I, p. 145).

Procedural Background

Petitioners suffered damages identical to the type of damage suffered by the hospitals in *Great Plains*, *Trinity Lutheran*, and *Alexian Brothers*. Consequently, shortly after the *Great Plains* decision became final, these Hospitals sought to recover Medicaid reimbursement that they would have received but for the invalid Psych Cap regulation. In other words, they sought the

same relief afforded the hospitals in *Great Plains*, *Trinity Lutheran*, and *Alexian Brothers*. Petitioners sent letters to the Director of DMS claiming that they were entitled to Medicaid reimbursement plus interest for the difference between the Plan Rate and the Psych Cap rate. (L.F. 10-11). These claims were filed after the Psych Cap was temporarily withdrawn, but before it was permanently withdrawn. The State denied these claims. (L.F. 12-13).

Pursuant to Section 1396a(37) of the Medicaid Act, state Medicaid plans are to provide for claim review in order "to ensure the proper and efficient payment of claims and management of the program." 42 U.S.C. § 1396a(37). The federal regulations require an appeal process:

> (e) Provider Appeals. The Medicaid agency must provide an appeals or exception procedure that allows individual providers an opportunity to submit additional evidence and receive prompt administrative review, with respect to such issues as the agency determines appropriate, of payment rates.

42 C.F.R. § 447.253(e). In Missouri, this appeal process is conferred by Section 621.055, Mo. Rev. Stat., which provides in pertinent part:

> Any person authorized under section 208.153, RSMo, to provide services for which benefit payments are authorized under section 208.152, RSMo, may seek review by the administrative hearing commission of any of the actions of the department of social services specified in subsection 2, 3, or 4 of section 208.156, RSMo.

Section 208.156, Mo. Rev. Stat. (1994)[2], grants healthcare providers, such as Petitioners, the right to seek review of the State's actions. Section 208.156.4 grants a hearing before the Administrative Hearing Commission ("AHC") to any Medicaid provider "who is aggrieved by any rule or regulation promulgated by the department of social services." § 208.156.4, Mo. Rev. Stat. Pursuant to Section 208.156 Petitioners filed Complaints with the AHC claiming they were aggrieved as a result of the application of the invalid Psych Cap regulation. (L.F. 3-8). The AHC, after consolidating Petitioners' claims, held that it had jurisdiction pursuant to Section 208.156.4. It then granted summary determination in favor of Petitioners and ordered the same relief for Petitioners that was previously awarded in *Great Plains*, *Trinity Lutheran*, and *Alexian Brothers* (i.e. the State was ordered to reimburse the Hospitals the amount that the State had withheld under the invalid Psych Cap). (L.F. 171-182).

DMS sought review of this decision in the Circuit Court of Cole County. (L.F. 838-860). The Hospitals filed Cross-Petitions for Judicial Review alleging that the AHC failed to award appropriate interest. (L.F. 861-877). The cases were consolidated for review and the Circuit Court of Cole County reversed the AHC's decision, holding that the AHC did not have subject matter jurisdiction because the Psych Cap regulation was not in effect at the time that the Hospitals filed their claims. (L.F. 878-883) (Pet. App. A-31-32).

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[2] Unless otherwise indicated, all cites are to Section 208.156, Mo. Rev. Stat. (1994).

Decision of the Court of Appeals

The Court of Appeals affirmed the judgment of the Circuit Court, holding that once the Psych Cap rule was withdrawn the AHC no longer had jurisdiction to hear claims brought for damages arising from the prior application of the invalid regulation. (Pet. App. A-9-10). It further held that had Petitioners "brought complaints challenging the validity of the Psych Cap regulation during the time when the regulation was in effect, as did the hospitals in *Great Plains* and the two companion cases, the AHC would have had jurisdiction over the complaints pursuant to Section 208.156.4." (Pet. App. A-9).

The Hospitals subsequently filed a Motion for Rehearing and an Application for Transfer with the Missouri Court of Appeals. On February 1, 2000, the Court of Appeals denied the Motion for Rehearing and Application for Transfer. The Hospitals then filed their Application for Transfer with the Supreme Court of Missouri. On March 21, 2000, the Missouri Supreme Court denied the Hospitals' Application.

How the Federal Questions were Presented

This case involves the rights of Medicaid providers and the obligations of those states that choose to participate in the federal Medicaid program. More specifically, this case involves the rights of Medicaid providers to be reimbursed at rates established under a validly promulgated Medicaid plan and whether a state can ignore those rights and avoid its obligations by simply withdrawing a regulation that has already been declared invalid and void under federal Medicaid law. These federal Medicaid issues and concerns are intri-

cately intertwined with the facts of this case, are central to this entire lawsuit, and were raised below.

For example, in their Motion for Rehearing, the Hospitals argued, among other things, that the AHC's jurisdiction under Section 208.156.4 should not be tied to whether a regulation is currently in existence because that has no bearing on whether the entity is actually aggrieved by the rule and could promote manipulation of the Medicaid system. In their Application for Transfer, filed in the Missouri Court of Appeals, the Hospitals argued that the court's interpretation of Section 208.156.4 prevented damage claims of some while allowing others with identical type claims to recover simply because they were the first to raise the issue. The Hospitals further argued that the Court of Appeals' interpretation of the statute eliminated the State's responsibility and accountability for enacting invalid Medicaid rules. In their Application for Transfer filed in the Supreme Court of Missouri, Petitioners argued that the ability of the State to dispose of claims of Medicaid providers simply by adopting regulations withdrawing invalid rules affects the whole Medicaid program; sanctions the State's unlawful violation of Medicaid laws; results in the State facing minimal risk in enacting and carrying out invalid Medicaid rules; and would give states the opportunity to manipulate the Medicaid system at will.

Not only were these federal issues raised below, but this case was brought and decided in the wake of *Great Plains,* which held that the Psych Cap was invalid and void because it violated federal Medicaid law, i.e. the Boren Amendment. Petitioners sought to have this decision, which is based in federal law, applied to them.

In doing so, Petitioners relied on this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). *Beam,* and the principles of retroactivity and remedy set forth in that case, were raised in the Hospitals' brief filed in the Missouri Court of Appeals, in the Motion for Rehearing, and in the Applications for Transfer filed in both the Court of Appeals and the Supreme Court of Missouri.

Federal Medicaid law, facts, issues, and concerns are so intertwined and implicated in this case that state law does not independently and adequately support the judgment. In addition, the decision of the court below conflicts with the principles of retroactivity and remedy set forth in this Court's decision in *Beam*. Both items were raised below. Consequently, this Supreme Court has authority to review the state court decision.

REASONS FOR GRANTING THE WRIT

This Petition for writ of certiorari should be granted because a state should not be allowed to avoid accountability for its violation of federal Medicaid law by simply repealing what has already been found to be a void regulation. To tie the jurisdiction of the AHC and the remedy of other providers injured by the same void act to what should be a meaningless act, i.e. the withdrawal of a void regulation, violates the principles underlying this Court's decision in *Beam* and renders all Medicaid providers susceptible to improper and unfair manipulation of the Medicaid reimbursement process.

In *Beam*, this Court clearly recognized that where a new rule of law has been applied to the litigants in one case, the rule must be applied with respect to all other similarly situated litigants who are not barred by proce-

dural requirements or res judicata. 501 U.S. at 544. This Court further recognized that retroactive application of a decision should not be limited to only those who had a challenge pending at the time of the decision. *Id.* at 542-43. For as this Court correctly observed, "distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review." *Id.*

The Court of Appeals' interpretation of Petitioners' Medicaid appeal rights under Section 208.156.4, Mo. Rev. Stat., extinguishes the damage claims of some while allowing others with identical type claims to recover simply because they were the first to race to the court house. This interpretation does just what this Court in *Beam* was trying to prevent. 501 U.S. 529, 541-43. Moreover, the simple repeal or withdrawal of an already invalid and void regulation does not eliminate the damages incurred by Missouri providers as a result of the State's violation of federal Medicaid law for over six years. By the same token, the repeal or withdrawal of an invalid and void regulation should not cut off retroactive relief that one would otherwise be entitled to or divest the AHC of subject matter jurisdiction. If it does, then the Medicaid system is susceptible to improper manipulation.

The Court should issue a writ of certiorari to correct the decision of the court below and to provide needed guidance on these important issues.

I. THE MISSOURI COURT OF APPEALS' RULING WHICH HAS THE EFFECT OF TREATING SIMILARLY SITUATED ENTITIES DIFFERENTLY IS SO PLAINLY WRONG UNDER THIS COURT'S PRECEDENT AND MEDICAID APPEAL CASES FROM OTHER STATES AS TO WARRANT SUMMARY REVERSAL.

On October 22, 1996, the Missouri Supreme Court denied the Application for Transfer that was filed in *Great Plains*. Seven days later, on October 29, 1996, Petitioners began filing their claims. Petitioners, relying on principles set forth in *Beam*, waited until the decision in *Great Plains* was final before filing their lawsuits. They did this in order to avoid separate and repeated litigation of the same issue. Now they are being punished for having done so. The decision reached in the court below is so clearly wrong under this Court's precedent and Medicaid appeal cases from other states as to warrant summary reversal.

In *Beam*, Georgia law imposed an excise tax on imported liquor at a rate double that imposed on liquor manufactured from Georgia-grown products. In 1984, the Court held that a similar Hawaiian law violated the Commerce Clause. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). After the *Bacchus* opinion was announced by this Court, a Kentucky manufacturer brought suit in Georgia State court seeking a retroactive refund of taxes it paid under Georgia's law for 1982, 1983, and 1984. The Georgia court relying on *Bacchus* declared the statute unconstitutional but refused to apply its ruling retroactively. The Georgia Supreme Court affirmed the decision and applied the finding on a prospective-only basis in that it declined to declare the

state's application of the statute unconstitutional for the years in question. *Beam*, 501 U.S. at 533.

This Court reversed the Georgia Supreme Court's decision and held that once a court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. *Beam*, 501 U.S. at 533-34. This Court held that *Bacchus* applied retroactively to claims arising on similar facts antedating the *Bacchus* decision as well as later cases. *Beam*, 501 U.S. at 532. "The question presented is whether our ruling in *Bacchus* [full citation omitted] should apply retroactively to claims arising on facts antedating that decision. We hold that application of the rule in that case requires its application retroactively in later cases." *Id.*

The *Beam* case is controlling on the issue of retroactive application of the law. Even though this case involves a regulation, which was found to violate federal Medicaid law, and not constitutional law, the doctrine of retroactivity as discussed in the *Beam* case is "overwhelmingly the norm" in civil matters. *Beam*, 501 U.S. at 535.

None of the decisions in *Great Plains*, *Alexian Brothers*, or *Trinity Lutheran* remanded the cases to determine whether or not the law should be applied retroactively or prospectively. *See American Trucking Assn's, Inc. v. Sheiner*, 483 U.S. 266, 297-98 (1987) (showing the Court's ability to reserve the question of retroactivity). Those three cases all held that the hospitals were entitled to be reimbursed the difference between the amounts that they received with the Psych Cap and the amounts that they should have received without it. Since the *Great Plains* court provided a retroactive

remedy to the litigants before it, the same remedy should be applied to all other litigants. *Beam*, 501 U.S. at 538-40. The ruling in *Great Plains* must be applied to all other hospitals who make the same claim for reimbursement who are not barred by the statute of limitations or res judicata. *Id.* at 544. There exists no procedural bar to Petitioners raising these claims.

The court below held that *Great Plains* does not apply to Petitioners because the Psych Cap regulation was no longer in effect when they filed their claims. The Court of Appeals concluded that because the Psych Cap rule was not in effect at the time Petitioners' claims were filed, because it had been temporarily repealed by an emergency rule on September 13, 1996, Petitioners were not "presently aggrieved" and therefore the AHC lacked jurisdiction over their claims. Essentially the Court of Appeals held that except for *Great Plains* and its companion cases, *Great Plains* must be given prospective effect only and that no other hospitals may be reimbursed for their damages resulting from the invalid Psych Cap.

If allowed to stand, the Court of Appeals' decision would preclude Petitioners from suit because they did not beat the hospital in *Great Plains* to court. This Court, in rejecting such a result, has noted that selective prospectivity breaches the principle that "litigants in similar situations should be treated the same." *Beam*, 501 U.S. at 537-38. This Court has further recognized that it is a departure from basic judicial tradition when "we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Id.* (quoting *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting)).

Moreover, as this Court has recognized, the fact that Petitioners did not have a claim pending at the time that the Psych Cap was found invalid and void does not eliminate their right to proper reimbursement for Medicaid services.

> We might, of course, limit retroactive application to those who at least tried to fight their own battles by litigating before victory was certain. To this possibility, ***it is enough to say that distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review.***

Beam, 501 U.S. at 542-43 (emphasis added).

The application of the rule announced in *Great Plains* to Petitioners is governed by the retroactivity principles set forth in *Beam*. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) ("Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law."). Pursuant to those principles, Petitioners are entitled to the same relief that the hospitals in *Great Plains*, *Trinity Lutheran*, and *Alexian Brothers* received.

Applying the *Great Plains* decision retroactively is consistent with Medicaid appeal cases from other states as well. In the case of *In re Avon Nursing Home v. Axelrod*, 639 N.E.2d 1124, 1127 (N.Y. 1994), following invalidation of the state's Medicaid reimbursement methodology by the Second Circuit Court of Appeals on Boren Amendment grounds in *Pinnacle Nursing Home*

v. Axelrod, 928 F.2d 1306 (2nd Cir. 1991), a group of nursing homes commenced an action to recover underpayments due to the application of the unlawful regulation to them in prior years. New York's highest state court affirmed the lower court's decision and granted retroactive relief for the period of 1987-1991 under the previously existing rate structure and without regard to the invalid regulation. The court stated, "[P]etitioners are entitled to have their rates for the years in dispute recalculated and to be reimbursed for any amounts owed them by reason of that recalculation." *In re Avon Nursing Home*, 639 N.E.2d at 1127. Other cases in which Medicaid reimbursement methodology has been invalidated have also awarded relief to the provider based upon the previous unamended plan. *See Volk v. Dept. of Human Resources*, 799 P.2d 658, 664 (Or. 1990) ("We agree with plaintiffs that, on invalidation of the plan amendments, reimbursement must be made pursuant to the previous unamended plan."); *Americare Properties, Inc. v. Whiteman*, 891 P.2d 336, 349 (Kan. 1995) (affirming trial court decision invalidating Medicaid Plan and requiring reimbursement under prior plan); *New England Mem'l Hosp. v. Rate Setting Comm'n*, 475 N.E.2d 740, 745 (Mass. 1985) ("Where no effective new rate has been established, the old rate remains in effect.").

In light of this Court's decision in *Beam* and Medicaid appeal cases from other states, the Missouri Court of Appeals erred in not allowing Petitioners the relief which was afforded other similarly situated hospitals.

II. A STATE SHOULD NOT BE PERMITTED TO AVOID LIABILITY AND FEDERAL REMEDY AND RETROACTIVITY PRINCIPLES BY SIMPLY WITHDRAWING A REGULATION WHICH HAS ALREADY BEEN DECLARED INVALID AND VOID BECAUSE IT VIOLATES FEDERAL MEDICAID LAW.

Despite the fact that Petitioners have suffered identical damages to those suffered by the hospitals in *Great Plains*, *Trinity Lutheran*, and *Alexian Brothers*, the Missouri Court of Appeals denied Petitioners the same relief because the State took the meaningless act of withdrawing an administrative rule already declared invalid and void under federal Medicaid law. Had this act not been taken, then according to the court below, the AHC would have had jurisdiction to hear the Hospitals' claims because Petitioners would then have been Medicaid providers *presently* aggrieved by an *existing* rule or regulation promulgated by the DMS. (Pet. App. A-8).[3]

The withdrawal of a Medicaid regulation, after it has been applied to a Medicaid provider's detriment, should not be the determining factor in deciding whether that provider is aggrieved; should not divest the AHC of jurisdiction over Medicaid claims arising from the impo-

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[3] In fact, the words *presently* and *existing* do not appear either explicitly or by implication in Section 208.156.4, Mo. Rev. Stat.

> Any person . . . who ***is aggrieved by any rule or regulation*** promulgated by the department of social services or any division therein shall be entitled to a hearing before the administrative hearing commission . . .

§ 208.156.4, Mo. Rev. Stat. (emphasis added)

sition of the rule or regulation; should not allow a state to avoid liability for violating federal Medicaid law; should not extinguish Medicaid provider appeal rights; and should not defeat the retroactivity principles set forth in *Beam*. This is particularly true, where as here, the withdrawn Medicaid regulation has already been declared invalid and void. The withdrawal of a rule that has been declared invalid and void is, or at least should be, a meaningless act. *See Psychcare Management v. Dept. of Soc. Servs.*, 980 S.W.2d 311, 313 (Mo. banc 1998). Since the Psych Cap never had the force and effect of law, it was a nullity. Thus, its withdrawal after being judicially declared invalid was meaningless and should not be a determining factor in this case.

The Missouri Court of Appeals' interpretation of Section 208.156.4, Mo. Rev. Stat., is wrong because it sanctions the State's unlawful violation of the Boren Amendment, results in the State facing minimal risk in enacting and carrying out invalid Medicaid rules in the future, and extinguishes Medicaid provider appeal rights. The Court of Appeals' decision states that the AHC will have jurisdiction only in cases where a person is *presently* injured by an *existing* rule. Thus, under the Court of Appeals' interpretation, the State is now free to enact a questionable Medicaid rule and if a challenge is upheld, the State can quickly withdraw it while it is on appeal, thereby avoiding liability to all other providers for violation of federal Medicaid law and extinguishing their appeal rights. If the challenge is denied, then the State can re-enact the rule by emergency amendment with a retroactive effective date. Medicaid providers and beneficiaries should not be subject to such arbitrary conduct by states.

A state should not be allowed to avoid paying Medicaid providers the difference between what they were paid under an invalid regulation and what they should have been paid simply because the state withdrew a regulation which had already been declared invalid and void under federal Medicaid law. The decision of the court below eliminates the State's responsibility and accountability for enacting invalid Medicaid rules and renders the entire Medicaid system susceptible to improper and unfair manipulation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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